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SENT ELECTRONICALLY, BY FAX AND MAIL

August 10, 2001

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, Massachusetts 02110

RE: Initial Comments, Competitive Market Initiatives, D.T.E. 01-54

Dear Secretary Cottrell:

On July 24, 2001, the Department of Telecommunications and Energy ("Department") held a technical conference in Competitive Market Initiatives, D.T.E. 01-54. At the technical conference the Department requested comments on several issues. The Attorney General submits this letter as his Comments.

Background

On June 29, 2001, the Department issued an Order opening a formal investigation into competitive market initiatives with the intent to minimize or eliminate any barriers to competitive choice. *Competitive Market Initiatives*, D.T.E. 01-54. In its Order, the Department decided to phase its investigation and identified the areas that would be investigated separately.

The Department stated that its "objective for the first phase of this proceeding is to establish a comprehensive set of initiatives that will ensure that competitive suppliers have appropriate access to information regarding default service customers." D.T.E. 01-54, p. 7. Therefore, the Department "directed each distribution company to immediately make available default service customers' names, addresses and rate classes to suppliers and brokers." *id.* In addition, the Department indicated that Phase I would address, among other issues, "the manner in which customer's historic load data and credit information can or should be made accessible to competitive suppliers" in an effort to facilitate suppliers' ability to effectively target their

marketing efforts. The Department opined that "unlike customers' names and addresses, historic load information and credit information **may** be considered proprietary to companies operating in certain industries."[1] (emphasis added) *id.* Because of the concern over confidentiality of certain information, the Department proposed that load and credit history be provided to interested suppliers only if a default service customer has affirmatively authorized the distribution company to do so. This proposal, and other issues dealing with access to customer information, were scheduled to be the subject of a separate technical session held on July 24, 2001. The Department stated further that subsequent phases of this proceeding would deal with issues such as the use of Internet-based auctions with the distribution company acting as a broker, the role of municipal aggregation, how to facilitate customer authorization, the use of electronic signatures and other issues that might be identified in the future. At the technical session the Department solicited comments regarding the Department's proposal, issues raised during the session and legal issues related to the use of electronic signatures.

Comments

The Attorney General is concerned that the Department, despite the Attorney General's objection, ordered distribution companies to provide the names and addresses of default service customers without their prior knowledge or consent, or without imposing any notification requirement whatsoever on the suppliers or their telemarketing firms.[2] The Attorney General renews his recommendation that customers are given the affirmative right to choose not to participate in the requirement that the distribution company make available default service customers names, addresses and rate classes to suppliers and brokers.[3]

The Attorney General urges the Department to order distribution companies to immediately notify customers via a separate mailing of the release of the data to suppliers and to

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[1] The Department appears to distinguish between Commercial and Industrial ("C&I") customers and residential customers with regard to whether credit information and load history is considered confidential information. This distinction is in contrast with the Department's treatment of customers regarding customer names and addresses. The Department did not distinguish between C&I and residential customers with regard to the Department's order that distribution companies supply customer names and addresses to any supplier requesting such data. The Attorney General submits that the Department must treat all customers, whether residential or C&I, in a similar fashion for these purposes.

[2] The distribution companies have agreed to the Attorney General's informal request that they not disclose the identity of low-income customers in a distinguishable manner when making available the names, addresses and rate classes to suppliers and brokers. The identification of residential customers taking service as low-income customers may result in economic redlining.

[3] In support of its decision to disclose this information, the Department indicated that address and class of service are not proprietary and that this type of information is widely available to telephone local exchange carriers in the Commonwealth. The Attorney General submits that as with telephone customers, electric customers are entitled to "unpublished" and "unlisted" accounts. The freedom of choice recognized by the Electric Restructuring Act includes the freedom to be left alone. This affirmative right to privacy is codified at G.L. c. 214, § 1B.

provide a response card and phone number that would enable customers to notify a company of their choice to have any of their information removed from further release. The Attorney General also recommends that the Department require distribution companies to notify suppliers of the customers' choice and further require that any supplier contacting a customer subsequent to such notification would be deemed to have made an unauthorized customer contact which would be subject to the same sanctions as if the supplier had switched the customer without authorization. G.L. c. 164, § 1(F)(8)(a)

It is the Attorney General's position that the unauthorized release of customer credit and load information by distribution companies, suppliers and brokers is an unfair and deceptive trade practice or act that may be actionable under General Laws, Chapter 93A, and that load and credit information may be released as proposed only with the prior consent of the customer. (*See* Response to Briefing Question below). As a further condition on the release of such information, the Department should require that the distribution company providing credit information strictly comply with all applicable state and federal credit reporting laws. In addition, the Department should establish fines and penalties for both utilities and suppliers for the unauthorized reporting and/or release of credit information without proper customer authorization, the use of this data for any purpose other than establishing credit for the purchase of electricity and for any other misuse of this highly sensitive confidential information.

Electronic Signatures Briefing Question

In its Order in D.T.E. 01-54, the Department stated its intent to investigate issues involving internet-based customer authorizations or "electronic signatures." The Department stated: "General Laws c. 164, § 1F requires customer authorization for switching must be in written form or via telephone with a third-party verification. The Department suggested that the customer authorization requirement contained in G.L. c. 164, § 1F which was established as a consumer protection against "slamming" may be a barrier to competitive suppliers that seek to do business through the Internet." D.T.E. 01-54, at 10. The Department requested comments on whether the use of electronic signatures is valid in Massachusetts. In particular, the Department requested a discussion of whether there is any legal impediment to the use of electronic signatures in transactions related to contemplated competitive market initiatives, such as the authorization for switching a consumer to a competitive supplier or the authorization to release customer usage information. The Department further requested recommendations about how to overcome any identified legal impediments to the use of electronic signatures.

In the Electric Restructuring Act (the "Act"), St. 1997, c. 164, the Legislature included language to address the issue of unauthorized switching of service ("slamming").[4] The slamming provisions were included as a result of the significant numbers of such cases involving the

[4] The Department's regulations at 220 C.M.R. 11.04(12)(a) and 11.05(4)(a) mirror the G.L. c. 164, § 1F with regard to the required customer authorization process to switch electricity service.

telephone industry. Because the Legislature did not address the issue of the use of electronic signatures, so-called, in these consumer protection provisions of the Act, the Act is silent about the use of electronic signatures.

G.L. c. 164, § 1F requires a customer to make an affirmative choice to obtain service from a generation company, supplier or aggregator. The term "affirmative choice" requires a customer to either (1) sign of a letter of authorization, or (2) with regard to initial oral authorization, requires third-party verification or the completion of a toll-free call made by the customer to an independent third party operating in a location physically separate from the telemarketing representative who has obtained the customer's initial oral authorization to change to a new electricity provider.

The Act establishes the specific information that must be included in a letter of authorization and requires that a complete customer acknowledgment must be included in a customer's first bill from a new company.[5] In order to be considered valid under the statute of frauds, the Act requires a signature to be provided in writing in order to ensure that a customer clearly intended to switch service from one provider to another.

On June 30, 2000, Congress enacted the Electronic Signature in Global and Nation Commerce Act ("ESIGN") to facilitate the use of electronic records and signature in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically.[6] Congress, in order to preserve the underlying consumer protection laws governing consumers' right to receive certain information in writing, imposed special requirements on businesses that want to use electronic signatures or records in consumer transactions.

Section 101 (c)(1)(C)(ii) of ESIGN requires businesses to obtain from consumers electronic consent or confirmation to receive information electronically that a law may require to be in writing. Section 101 (c)(1) of ESIGN provides that information required by law to be in writing can be made available electronically to a consumer only if that consumer affirmatively

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[5] G.L. c. 164, § 1F requires a customer to make an affirmative choice to obtain service from a generation company, supplier or aggregator. The Act specifically prohibits a third party verifier or marketing company from using the information in any instance for commercial or other marketing purposes and shall not be sold, delivered or shared with any other party for such purposes. A "letter of authorization" is required to conform to the requirements of the Act, and a completed customer acknowledgment must be included in a customer's first bill from a new company as well as information about how to file a complaint regarding an unauthorized switch of service. The Department is required to provide an initial response to any customer complaints within 10 (ten) days. A company that makes an unauthorized switch is subject to civil money penalties and suspension from business in the commonwealth for up to one year. The Department is required to track all slamming complaints and file an annual report with the Legislature.

[6] Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. § 7001 et seq.).

consents to receive the information electronically (Section 101 (c)(1)(A)) and the business clearly and conspicuously discloses specified information to the consumer before obtaining his or her consent. [7] Moreover, Section 101 (c) (1)(C)(ii) states that a consumer's consent to receive electronic records is valid only if the consumer "consents electronically or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent."

Section 102 of ESIGN provides that a State statute, regulation or other rule of law may supersede the provisions of Section 101 only if it constitutes the enactment of the Uniform Electronic Transactions Act or specifies alternative procedures or requirements for the acceptance of electronic signatures and records to the extent that they are not inconsistent with the provisions of ESIGN and do not accord any greater legal status or effect to a specific technology or technical specification. Currently, the Massachusetts Legislature is considering two bills, S. 1803 and S. 1805, which if enacted, will adopt the Uniform Electronic Transactions Act. Congress created specific exemptions to the provisions of Section 101, and including the exemption that any notice of the termination or cancellation of utilities services, as defined, must be provided in accordance with a State statute, regulation or other rule of law.

In its discussion of ESIGN, Congress restated its intent to preserve the underlying consumer protections afforded to electricity customers by statute and regulation. Although an electronic signature on a contract between two willing parties may not be considered invalid merely because it is an electronic signature, (provided that it is obtained through the terms and conditions established by both state and federal law) any violation of these requirements may be actionable under General Laws, Chapter 93A. Any enforcement action will be in addition to the fines and penalties issued by the Department for violation of these provisions.

The Massachusetts Legislature did not contemplate the provisions of the ESIGN Act when it enacted the Electric Restructuring Act. However, the Legislature was clearly concerned about reducing the potential for slamming or other unscrupulous activity related to providing electricity services in a competitive market. Therefore, the Attorney General recommends that the Department require written verification or third-party verification for electronic signatures, similar to the verification requirement imposed for oral means of switching service.

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[7] Section 101 (c)(1)(B). The disclosures include: (1) whether the consumer may request to receive the information in non-electronic or paper form; (2) the consumer's right to withdraw consent to electronic records and the consequences - including possible termination of the relationship - that will result from such withdrawal; (3) the transaction(s) or categories of records to which the consent applies; (4) the procedures for withdrawing consent and updating the information needed to contact the consumer electronically; and (5) how the consumer may request a paper copy of the electronic record as well as what fees, if any, will be charged for the copy. Section 101 (c)(1) (B) (I)-(iv). In addition, businesses must provide the consumer with a statement of the hardware and software needed to access and retain the electronic record.

Regarding the issue of authorization to release customer usage information, the Attorney General recommends that the Department require written verification or third party verification of any electronic signature prior to the release any customer usage related information. The Attorney General submits that the Department should take a proactive stance in the electricity sector to prevent the numerous complaints about slamming, the unauthorized addition of services ("cramming") and other fraudulent activities that occurred as a result of competition in the telephone sector.

The Attorney General welcomes the opportunity to respond to the comments of other interested parties regarding the issues raised during the technical session.

Sincerely,

Judith Laster
Assistant Attorney General

cc: Jeanne L. Voveris, Hearing Officer
electronic service list